United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

77-1472

To be argued by
PATRICIA ANNE WILLIAMS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1472

B/S

UNITED STATES OF AMERICA,
Appellee,

—v.—

HAROLD WOODFORD,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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UNITED STATES COURT OF APPEALS
FILED
MAY 22 1978
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

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Docket No. 77-1472

UNITED STATES OF AMERICA,

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HAROLD WOODFORD,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Harold Woodford appeals from a judgment of conviction entered on November 9, 1977, in the United States District Court for the Southern District of New York, after a three-day trial before the Honorable Dudley B. Bonsal, United States District Judge, and a jury.

Indictment S 77 Cr. 368 was filed on July 11, 1977 in three counts. Count One charged Woodford with conspiring with unindicted co-conspirators, Lucille Williams and Herman Howell, a/k/a "Bubbie," to distribute and possess with intent to distribute heroin, in violation of Title 21, United States Code, Section 846. Counts Two and Three charged Woodford with the substantive offense of possession with intent to distribute heroin, in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).

Trial commenced before Judge Bonsal and a jury on September 26, 1977, and concluded on September 30, 1977, when the jury found Woodford guilty on Counts Two and Three.*

On November 9, 1977, Judge Bonsal sentenced Woodford to a term of imprisonment of eight years, on each of Counts Two and Three of Indictment S 77 Cr. 368, the sentences to run concurrently, and imposed a special parole term of six (6) years to follow the expiration of the term of imprisonment.

Woodford is serving the sentence imposed by Judge Bonsal.

Statement of Facts

The Government's Case

A. Synopsis

The Government's evidence established that Harold Woodford during the period from on or about January 18, 1977 through March 15, 1977, engaged in the business of providing narcotics to Lucille Williams who, in turn, sold it to others. Lucille Williams testified for the Government.

B. The background of the relationship between Woodford and Lucille Williams

Lucille Williams met the defendant Harold Woodford, whom she knew as Kilpatrick, in 1962 or 1967. At that time Williams was working with a neighborhood drug

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* On September 29, 1977, Judge Bonsal, on his own motion, dismissed Count One.

control program where her function was to try to obtain jobs for former addicts. Woodford shared the directorship of that program with another man named Hezekiah Felton. (Tr. 25).* In 1973 or 1974 Williams obtained some heroin from Woodford for a friend, and then later gave Lucille a few dollars for performing the service. (Tr. 26).**

C. The sales of Heroin on January 18, and 26, 1977

On January 18, 1977, "Bob," an informant for the Drug Enforcement Administration, ("DEA"), placed a telephone call to Lucille Williams in the presence of Special Agent John E. Daniocek. (Tr. 81). Bob, whom Lucille knew as a friend of "Bubbie," her common-law husband Herman Howell, told Lucille he wanted to buy some heroin. (Tr. 20-29). Following the call with Bob, Lucille, after first attempting unsuccessfully to telephone Woodford at 865-1115 (Tr. 27), met Woodford at 126th Street and Eighth Avenue. At this time Lucille asked Woodford whether he could get some heroin for her. Woodford replied that he could. Lucille then returned home, where she received another call from Bob who told her that he was on his way to her house. (Tr. 28-29).

The same evening the informant met with Special Agent Daniocek and other agents of the DEA. Bob was searched, as was his car, for contraband, weapons or money. Bob then was supplied with a tape recorder

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* References to "Tr." are to pages of the trial transcript; references to "GX" are to Government Exhibits introduced at trial.

** Williams' relationship with Woodford also was quasi-familial: Woodford was the father of Lucille's sister Donna's baby. (Tr. 74). In addition, in January, 1977, Williams then common law husband, Herman Howell, began working for Woodford in his business of renovating buildings. (Tr. 63, 205).

which was secreted in the small of his back. (Tr. 81-82). Thereafter the informant, followed by Special Agent Daniocek, drove to the vicinity of West 161st Street and the Grand Concourse in the Bronx, where, after a second search, the informant was given $1500 with which to purchase two ounces of heroin (Tr. 82). The informant then proceeded to 1060 Sherman Avenue where Lucille Williams resided with Herman Howell. (Tr. 21, 82, 260).

Inside the apartment Williams, Howell and the informant talked for a while and then the informant and Howell entered the informant's car. (Tr. 29, 82). A short while later Lucille joined the two men and all three proceeded to the southwest corner of West 113th Street and Manhattan Avenue, where the car was parked. (Tr. 30, 83). At all times this car was in the view of Special Agent Daniocek. (Tr. 84).

Williams left the informant's car and walked down the north side of West 113th Street to number 307 which she entered. (Tr. 30, 143, 154). Parked in front of the building at this time was a 1976 brown Toronado Oldsmobile with Pennsylvania license plate number 2X4435. (Tr. 156). When Williams entered the first floor office area of the building Woodford was not present and Williams was told by other people that he had stepped out for a few minutes. (Tr. 30). Williams then made several trips back and forth between the informant's car and the building while she waited for Woodford to return. (Tr. 29-35, 85, 143-145, 153-156).* Eventually, Woodford returned and met with Williams. Williams handed to him over $1000, which the informant had given

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* During one of these trips away from 307 West 113th Street, Special Agent Smith saw Woodford leave 307, enter 310 West 113th Street, directly across the street from 307, and then return to 307. (Tr. 159-159).

to her, and Woodford, in turn, gave her two ounces of heroin. The heroin was contained in plastic bags which Woodford placed inside a brown paper bag. (Tr. 33-34; GX 2). Williams also borrowed $20 from Woodford and was given a "spoon" of heroin for herself. (Tr. 34). After the exchange was completed, Williams delivered the two ounces of heroin to the informant and returned home with Howell. (Tr. 34-35).*

Approximately four to eight days later, Williams again telephoned Woodford to arrange for another purchase of heroin for the informant. (Tr. 37). On this occasion Williams went to the office and spoke with Woodford in person to put in an order for four ounces of heroin. (Tr. 37-38). At about 6:20 p.m. that evening, Agents Daniocek, Pavichevich, Smith and Curtis Fillmore observed Williams and the informant arrive at West 113th Street in a taxi. While the informant waited in the taxi, Lucille ascertained that Woodford hadn't arrived at 307 West 113th Street and advised the informant that they would have to wait. (Tr. 38-39).

At about 6:20 p.m. Woodford arrived in the same brown Toronado observed only a few days earlier at the first sale. Woodford, two men and a woman got out of the car and entered the building. (Tr. 175-177). Williams, upon seeing Woodford's car arrive, walked back to 307 West 113th Street. (Tr. 39-40, 175). Once inside the building, Williams and Woodford withdrew alone into the rear of the first floor where Lucille repeated that she wanted four ounces of heroin. (Tr. 40). Williams then left the premises and returned to the taxi where she received over $2000 from the informant.** Williams re-

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* Agent Smith testified that he observed Woodford and three other men leave the area in the same brown Toronado parked in front of 307 West 113th Street. (Tr. 156-157).

** Almost immediately thereafter an unidentified man was observed by Agent Fillmore to enter the basement of 310 West

[Footnote continued on following page]

turned to Woodford's office with the $2000 where Woodford and Williams again withdrew into the rear portion of the first floor. An exchange of money for heroin again took place, with Williams paying to Woodford the money which she had gotten from the informant, and Woodford handing to Williams a paper bag containing four plastic envelopes filled with heroin, plus another ounce of heroin for Williams herself. (Tr. 41-42; GX3). Williams returned to the taxi, gave the informant the four ounces of heroin, and returned to her home.*

D. The Search of 307 and 310 West 113th Street

On February 15, 1977, pursuant to a valid search warrant, the premises of 307 and 310 West 113th Street were searched. (Tr. 97, 99). In the left-hand office area of 307 West 113th Street inside a locked strong box was a plastic bag and three glassine envelopes, all containing cocaine and one containing cocaine and heroin. (Tr. 163-164; GX 8A, 8B, 8C). Agent Daniocek testified that the mailboxes at that building bore the names Harwood Realty and H. Kilpatrick. (Tr. 126). A set of narcotics paraphernalia were found in a desk drawer of an office on the other side of the entrance hallway. (Tr. 164-167; GX 7).

113th Street and then to return to 307 West 113th Street. (Tr. 175-176). Both 307 and 310 West 113th Street were shown to be owned by Woodford through his corporation, Harwood Realty, by his post-arrest statements to an Assistant United States Attorney. (GX 6).

* At about 8:00 p.m., approximately one hour later, Woodford and a woman Williams described as Frances, the same woman who earlier had helped her count the money, visited Williams at 1060 Sherman Avenue for several hours. (Tr. 43-44, 149, 159-160, 176). Woodford complained that the purchase price paid for the four ounces of heroin was $10.00 short. (Tr. 43-44).

E. The Arrest of Williams

Approximately one month later, Special Agent Daniocek, acting in an undercover capacity as Jack Diaz, negotiated with Lucille Williams for the purchase of ten (10) ounces of heroin at a price of $5,600.00. (Tr. 44-45, 102-103). These negotiations took place by telephone with Agent Daniocek reaching Williams at 992-2807. (Tr. 104). Williams contacted Woodford at the office at 307 West 113th Street and arranged to receive the ten ounces of heroin from Woodford at West 139th Street and Lenox Avenue in a building under construction. (Tr. 45-46, 72). On March 15, 1977, Daniocek drove Williams and Howell in his car to a restaurant-bar on Columbus Avenue in the nineties. Williams told Daniocek that he would have to give her the money if he expected her to go to West 139th Street and Lenox Avenue to get the heroin. When Daniocek could not persuade Williams to complete the transaction in a different fashion, Williams and Howell were arrested. (Tr. 45, 46, 73).

F. The Arrest of Woodford

After Lucille Williams' arrest and pursuant to her statements, surveillance was instituted in the vicinity of West 139th Street and Lenox Avenue. (Tr. 106, 177-181). Woodford was arrested when he exited building number 52. Woodford immediately was advised of his constitutional rights (Tr. 178-181), and searched for weapons. A small tinfoil package containing cocaine was found in Woodford's left boot. (Tr. 181-182, 108-109; GX 5). In response to questions, Woodford stated that his sole function on that evening was to introduce Williams to a man named John Middleton who would deliver ten ounces of heroin to Williams. Woodford said that he knew Williams and Middleton "from the streets" but could not give a description of either of them. (Tr. 107).*

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* A personal telephone book also found on Woodford's person at that time contained the name Lucille and the telephone number 992-2807. (Tr. 97, 100, 125; GX 4).

The Defense Case

Harold Kilpatrick Woodford, the defendant, testified in his own behalf and called two additional witnesses.

The thrust of Woodford's defense was that, although he previously had been in trouble with the law, he was a reformed person and now was the object of Williams' false accusations because of a relationship which had terminated bitterly. Woodford testified that he had previously been convicted on two occasions of possession of narcotics but that he had not sold any narcotics since 1969 when he was last released from prison. (Tr. 196-197; 218-219).*

Woodford admitted ownership through his corporation, Harwood Realty, of the buildings at 307 West 113th Street and 310 West 113th St. as well as other buildings. (Tr. 199-201). These buildings had been purchased for rehabilitation purposes and Woodford used 307 West 113th Street both as an office and as a warehouse for materials. (Tr. 201, 211-214). Woodford also admitted driving a brown Toronado which he claimed belonged to a nephew from Philadelphia. (Tr. 214).

Woodford claimed that he had had a relationship with Lucille Williams which began in 1969 but was terminated in 1971 or 1972. Thereafter, in 1974 Woodford fathered a child by Williams' younger sister, Donna. Woodford testified that this development caused Lucille to become vindictive and that, as a result, he avoided her. (Tr. 203-204, 208, 210-211, 221-222). However, Woodford admitted that he hired Herman Howell in January of 1977 at Lu-

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* On cross-examination Woodford stated that his 1963 conviction had not been for a sale of heroin but for possession with intent to distribute and that his involvement had been to "direct someone else." (Tr. 224).

cille's request. (Tr. 205, 223). Woodford also admitted that Williams telephoned him on March 15, 1977 and left a message, but claimed that he did not return the call. (Tr. 218).* Woodford specifically denied engaging in either of the heroin sales with Williams charged in the indictment.

Woodford claim[illegible]e visited 1060 Sherman Avenue on occasion to [illegible].s child (by Donna Williams) who lived in the building. (Tr. 209-210, 224).

Herman Howell, Lucille Williams' common-law husband, also testified in Woodford's defense. Howell stated that during the period January through March, 1977 he had lived with Lucille Williams at 1060 Sherman Avenue and worked as an unskilled labourer for Woodford whose office was located at 307 West 113th Street. (Tr. 259-261). Howell explained that he met Williams at Woodford's office about twice a month. (Tr. 262). Howell also claimed that he had given drugs to Lucille Williams on occasion but that he had never sold any personally. (Tr. 262-263).

Howell further testified that in late December, 1976, he and his brother, Barry, had obtained a quantity of heroin, some of which he used and some of which he sold. (Tr. 264-269).** Howell denied ever purchasing or obtaining any narcotics from Woodford, or being offered a purchase of narcotics by Woodford, or seeing Woodford sell narcotics. (Tr. 270).

On cross-examination, Howell admitted pleading guilty in May 1977 to possession of heroin with intent to distribute it on January 18, 1977. (Tr. 272-273). Howell also

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* On cross-examination Woodford further admitted that on the evening of March 15, 1977, when he was arrested he had denied any knowledge of Lucille Williams except "from the streets" and that he had denied any ability to describe her.

** Howell testified that he did not know the amount of heroin involved.

admitted that in February, 1977 he met a man whom he then knew as "Jack Diaz." Howell recalled the conversation with "Jack," but did not recall discussing Woodford. (Tr. 273). In fact, Howell specifically denied telling Diaz that Woodford's real name was Kilpatrick; that Woodford kept heroin in his premises at 307 and 310 West 113th Street; that Howell knew that the heroin was kept either in the basement or on the first floor of 310 West 113th Street; that he had seen Woodford go from 307 to 310 West 113th Street to obtain heroin; that Woodford supplied his employees with heroin; and that Howell knew Woodford had prior convictions for selling drugs. (Tr. 273-275.)

Howell also testified that on March 16, 1977, the day after his arrest, when he was interviewed by an Assistant United States Attorney, the entire left side of his face was severely burned. Howell explained that it was Lucille Williams who had inflicted that burn upon him during the course of a fight a few days earlier. (Tr. 276-277).

Ruby Holmes, the "Girl Friday" for Harkil Contracting Company, also testified on behalf of the defendant. (Tr. 280-282). Ms. Holmes testified that she had known the defendant as a friend for approximately 20 years and that she had been employed by Woodford since the inception of Harkil Contracting and Harwood Realty in 1974. (Tr. 287, 298-299). Ms. Holmes admitted that she had been an addict until 1973 or 1974. (Tr. 298).

Ms. Holmes described the interior of 307 West 113th and explained that it was possible for persons to enter the building without her seeing them. (Tr. 284, 288). Ms. Holmes testified that she did not know Lucille Williams although she knew of her, but that Williams telephoned frequently to speak to Howell or Woodford. Ms. Holmes stated that Williams came into the office at least two to three times per week and just sat around. (Tr. 289-293).

Ms. Holmes explained that Woodford worked 16 to 20 hours a day, seven days a week, on his buildings and that she had never seen Woodford use either of the two desks in the right-hand office of 307 West 113th Street. (Tr. 283, 285-286). She testified that the desk in which certain narcotics paraphernalia had been found had been used by a prior employee. (Tr. 281, 282, 284-286). Ms. Holmes also testified that the strongbox found by the agents in the office on the right-hand side of the building was left in one of the buildings by a former tenant who had paid for a time for it to be kept in storage. (Tr. 293-295).

On cross-examination Ms. Holmes testified that all items kept for storage were inventoried. (Tr. 298). No documents evidencing such an inventory for the strongbox were offered in evidence.

The Government's Rebuttal Case

In rebuttal, the Government introduced a portion of a tape recording of a conversation between Special Agent Daniocek and Herman Howell. Daniocek testified that in the undercover role of Jack Diaz, the financial backer of the informant, he sought information from Howell in February, 1977, concerning the location of the heroin which Lucille Williams was getting for the informant. (Tr. 303-304). The portion of the recorded conversation which was played for the jury contained Howell's statements that Woodford's real name was Kilpatrick, that he had been arrested previously for a sale of narcotics, that Woodford kept the heroin at 310 West 113th Street in the basement or on the first floor; that he had seen Woodford go across the street to 310 West 113th Street to obtain heroin and that on a regular day, Woodford had at least 15 customers for heroin. (Tr. 308-315).*

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* Agent Daniocek also testified that on the evening of March 15, 1977 when Howell was arrested, he had burn marks and bandages on the side of his face. (Tr. 316).

Detective William Modesto of the New York City Police Department also testified in rebuttal. Detective Modesto stated that in 1963, while working in an undercover capacity, he met Woodford for the purpose of purchasing narcotics. Detective Modesto explained that at that time, he purchased $75 worth of heroin, 25 glassine envelopes, directly from Woodford in a no longer existing cafeteria at 75 East 125th Street. (Tr. 320-322). A certified copy of the Judgment of Conviction was offered into evidence. (Tr. 323-324; GX 10).

ARGUMENT

Defendant Was Not Denied Effective Assistance of Counsel

Woodford claims on appeal that he was denied effective assistance of counsel in that his trial attorney made no pre-trial motion to suppress Woodford's prior criminal record which was elicited from the defendant during direct examination, and called a defense witness to exculpate Woodford, who had participated in a taped conversation in which he implicated the defendant. Woodford contends that these two instances amount to a constitutional deprivation of effective assistance of counsel and mandate a reversal of his conviction. Woodford's argument plainly must be rejected. Quite apart from the fact that his present complaints, even if taken at face value, do not amount to ineffective assistance of counsel, the record here makes clear, as we will demonstrate, that the two instances of which Woodford complains were reasonable tactical choices by his trial counsel, designed to further the defense proffered at trial.

In passing upon a claim of ineffective assistance of counsel, this Court long has adhered to the stringent

standard enunciated in *United States* v. *Wight*, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950).

> "A lack of effective assistance of counsel must be of such a kind as to shock the conscience of the Court and make the proceedings a farce and mockery of justice."

See *United States* v. *Bubar*, 567 F.2d 192 (2d Cir. 1977); *LiPuma* v. *Commissioner*, 560 F.2d 84, 88, 90 (2d Cir. 1977); *United States* v. *Daniels*, 558 F.2d 122 (2d Cir. 1977); *United States* v. *Morales*, 550 F.2d 402 (2d Cir. 1977); *Rickenbacker* v. *Warden, Auburn Correctional Authority*, 550 F.2d 62 (2d Cir. 1976); *Lunez* v. *Henderson*, 533 F.2d 1322, 1327 (2d Cir. 1976); *United States* v. *Yanishefsky*, 500 F.2d 1327, 1333 (2d Cir. 1974). Moreover, tactical and strategic decisions at trial, (including, for example, which witnesses to call and the manner in which the defense is to be conducted), are matters reserved to the discretion of trial counsel, whose judgment should not be second-guessed under the guise of an attack on the effectiveness of their representation. See *United States* v. *Yanishefsky*, *supra*; *United States* v. *Flannery*, 467 F.2d 201 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973). *See generally*, *United States* v. *Daniels*, *supra*; *United States* v. *Morales*. When these principles are given due accord in measuring trial counsel's performance here, it becomes plain that Woodford's trial counsel conceived and argued a plausible defense and that Woodford was not denied effective assistance of counsel.

A. The Use of Woodford's Prior Criminal Record was part of the Theory and Strategy of the Defense

In the course of Woodford's direct testimony at trial, counsel elicited briefly defendant's two prior convictions in 1958 and 1963 for selling heroin. (Tr. 196-97). Woodford also explained that he had been released from prison on the 1963 conviction on August 9, 1969. (Tr. 196-97). Defendant now asserts that his trial counsel's failure to have sought exclusion of the fact of these prior convictions constituted ineffective assistance of counsel.

The decision to utilize affirmatively Woodford's prior criminal record clearly was a tactical one and cannot be assigned as ineffective assistance of counsel. Woodford's admission of his prior record, at the very outset of his testimony, was an integral part of the defense theory that Woodford was a man with an inglorious past who was going to "make a complete breast of the information," as his attorney put it, in order to portray to the jury his present honesty and reformation. (Tr. 196). By this tactic it was the intention of the defense to pit Woodford's honesty directly against the alleged dishonesty of Lucille Williams—who currently used narcotics and who, as allegedly "a woman scorned" by Woodford, had a motive to lie.*

The thrust of this portion of Woodford's two-pronged defense was that he was a man with a prior record but one who had reformed. Hence Woodford maintained that he had sold no drugs since his release from prison eight years previously. (Tr. 197, 218-219, 227-228). He testi-

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* This strategy and theory of the defense was foreshadowed in the opening statement of the defense and in the cross-examination of Williams during which the fact was elicited that Woodford had fathered a child by Williams' sister Donna. (Tr. 18, 74-75).

fied that the buildings he had purchased on West 113th Street and elsewhere in New York City had been purchased at auction from the city at minimal prices. (Tr. 199-203). Woodford further testified, as did his "Girl Friday," Ms. Holmes, that he worked 20 hours every day renovating these buildings. (Tr. 200-203, 216, 282-283). Indeed Woodford testified that the majority of his employees were ex-offenders and that he hired Howell, Williams' common-law husband, in January, 1977, when Howell was released from prison, because someone had given him a chance after he was released from prison.

The plain thrust of Woodford's defense was to place him in the sympathetic position to argue to the jury that his candor about prior convictions bespoke a reformed and honest individual. Once in such a position, Woodford could argue that Williams, by contrast, with a motive to lie and an opportunity to implicate the defendant, was not to be believed. Toward this end Woodford's counsel made clear through his cross-examination of Williams, Agents Daniocek and Smith, and later in summation, that Williams, in an effort to frame him, had ready access to the defendant's office building where the heroin was stored. Moreover, Woodford's testimony concerning his imprisonment was necessary to prove that, contrary to Williams' testimony, she could not have met him in 1963 or 1964 at a time when he was in jail.

In short, Woodford was creating a picture in which he was cast as a man who had erred in the past, had "learned his lesson," and who now was leading a useful, constructive life. The admission by Woodford himself of his prior record was essential to the defense theory of the reformed man being falsely accused by reason of a scorned woman's venom. Thus, it was not ineffective assistance of counsel which led to the affirmative use of Woodford's prior criminal record of his defense case, but a reasoned and strategic decision of the defense.

Finally, it bears emphasis that even if the decision to elicit Woodford's past record had not been consistent with the defense theory, a motion to preclude cross-examination with respect to at least the 1963 conviction would have been unsuccessful. In the circumstances of defendant's testimony, which obviously placed in issue his veracity, as contrasted with that of Williams, the Government would have been entitled to impeach Woodford, pursuant to Fed. R. of Evid. 609(a)(1),* with the fact of his 1963 conviction. Since Woodford's 1963 conviction was for the sale of heroin, the trial judge would have been entitled to permit cross-examination about this conviction, pursuant to Rule 609(a)(1),** recognizing

> "that a narcotics trafficker lives a life of secrecy and dissembling in the course of that activity, being prepared to say whatever is required by the demands of the moment, whether the truth or a lie. From this [the District Court] could rationally conclude that such activity in a witness' past is probative on the issue of credibility." *United States* v. *Ortiz*, 553 F.2d 782, 784 (2d Cir. 1977); *See also*, *United States* v. *Hayes*, 553 F.2d 824 (2d Cir. 1977).

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* Rule 609(a) of the Federal Rules of Evidence provides for such use of a prior conviction

> ". . . if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment."

** The conviction was within the ten-year period permitted under Rule 609(b) since Woodford had not been released from prison until August 9, 1969. (Tr. 197). *See also*, *United States* v. *Reed*, 77-1319, 77-1320 (2d Cir., April 11, 1978).

In view of the great likelihood that any motion to preclude such cross-examination would have been unsuccessful, Woodford hardly can complain about the tactic to employ his criminal record affirmatively in the defense case rather than seek preclusion of this evidence. *United States* v. *Daniels, supra; LiPuma* v. *Commissioner, supra; United States* v. *Morales.**

B. The Decision to Offer the Testimony of Herman Howell Was a Proper Tactical One

Woodford's second claim of ineffective assistance of counsel centers on the consequences of the defense decision to call Herman Howell, a witness fully expected to exon-

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* It is true, of course, that cross-examination with respect to Woodford's prior conviction would not have been automatically permissible under Fed. R. of Evid. 609(a)(1), and that of the four factors mentioned by this Court in *United States* v. *Hayes, supra,* to be considered by the trial court in passing upon the issue of admissibility, two did not favor such impeachment. Nevertheless, in performing the balancing function required by Rule 609(a)(1), the trial judge clearly would have been justified in placing great emphasis on the fact that narcotics trafficking is a veracity-related crime and that it would have been "unfair and misleading" to have allowed Woodford to appear "pristine" in a case which appeared to revolve around his credibility versus that of Williams. *United States* v. *Ortiz, supra,* 553 F.2d at 785. Similarly, while the older 1958 conviction would have been excluded under Rule 609(b), absent special circumstances not clear in this record, the prejudice to Woodford from both convictions was hardly significant in view of the age of both and the focus of his defense. Most importantly, the point of analysis is not whether such convictions would have been excluded, but whether the decision to proffer a defense centered, in part, around the defendant's full candor, amounted to representation which "shocks the conscience" and which made a "farce and mockery" of the proceedings. Defendant's trial representation, even judged with the benefit of unhappy hindsight and by stretch of appellate counsel's pen, simply cannot be said to have been so "woefully inadequate" as to constitute ineffective assistance of counsel.

erate Woodford. Although in essence Howell's testimony was exculpatory of Woodford and supplied a missing link in defendant's theory, Woodford asserts that the Government's ability to impeach Howell with prior statements implicating Woodford points up the denial of adequate representation. This claim as well, when examined in the context of the record, does not withstand analysis.

The second prong of Woodford's defense theory was to create an alternate story to the one told by Lucille Williams. Although Woodford's testimony had established both the bias of Williams and a motive for her to lie, it was still necessary for the defense to suggest an alternative course for the heroin Williams admittedly had sold. Accordingly, Woodford offered the testimony of Herman Howell, the common-law husband of Williams, and a man convicted of one of the same offenses charged against Woodford. (Tr. 21-22, 260, 272).

Howell testified that he had given drugs to Williams on previous occasions and that in late December of 1976 he and one of his three brothers had gone to 116th Street somewhere between Madison and Eighth Avenues where they obtained an unknown quantity of heroin. (Tr. 267-268). Although it is clear that Woodford fully expected Howell to testify that he had given this heroin to Williams, Howell instead testified merely that he had sold some of the heroin and used the rest. (Tr. 265-266, 268-269). However, Howell also testified that he had never bought or otherwise received any narcotics from Woodford, never been offered any narcotics by Woodford and never seen Woodford sell narcotics. (Tr. 270). Although Howell's testimony fell somewhat short of its intended mark, it was, nevertheless, plainly sufficient as a whole to show that Howell allegedly had been the source of the heroin Williams sold to the informant. Moreover, that testimony was also plainly sufficient as a whole to support the theory that Howell, although an admitted heroin user himself, had never obtained any heroin from his employer.

On cross-examination, Howell admitted having had a conversation in February 1977 with the man he knew as Jack Diaz. Howell also testified that he recalled what he had said (Tr. 273), but denied telling Diaz that Woodford's real name was Kilpatrick although he used both names, that Woodford kept his heroin in the basement or first floor of 310 West 113th Street, that he (Howell) had seen Woodford go from 307 to 310 West 113th Street to obtain heroin, that Woodford supplied his employees with heroin and that Woodford had been previously convicted of selling narcotics. (Tr. 273-275).

The February, 1977 conversation to which Howell admitted in fact had been tape recorded, and the tape, which was introduced in the Government's rebuttal case, demonstrated that Howell had made the very statements he denied on cross-examination. Woodford now claims that, in view of the known existence of this tape, the decision to offer Howell's testimony was ill-advised and constituted ineffective assistance of counsel.

Woodford's present complaint amounts to little more than a post-trial criticism of the defense tactic with which he obviously concurred at trial, and affords him no basis for asserting ineffective assistance of counsel. Indeed, as is the rule with respect to trial tactical decisions, see *supra*, at 13, mere claims that counsel failed to explore and prepare the facts of the case in detail have consistently been held not to establish ineffective assistance of counsel. *United States* v. *Ortega-Alvarez*, 506 F.2d 455 (2d Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); *United States ex rel. Crispin* v. *Mancusi*, 448 F.2d 233 (2d Cir.), *cert. denied*, 404 U.S. 967 (1971); *United States* v. *Tribole*, 297 F.2d 598 (2d Cir. 1961); *United States* v. *Waters*, 461 F.2d 248 (10th Cir.), *cert. denied*, 409 U.S. 880 (1972); *Harshaw* v. *United States*, 542 F.2d 455 (8th Cir. 1976). Rather, the governing focus of review is on the actual conduct of the trial to determine whether counsel's assistance was effective.

In this case the defense which was elicited through Woodford's testimony—a simple denial that he had engaged in the heroin transactions as alleged by Williams—still left open for possible speculation the source of the heroin which Williams concededly delivered to the informant. Thus, in order to make Woodford's defense complete, it was reasonable to call Howell as a witness. The defense reasonably anticipated that Howell would exculpate Woodford either directly—by claiming that he, Howell, had delivered the heroin to Williams—or indirectly—by contending that as an addict and employee of Woodford's he had never received heroin from him. This latter argument would make it unlikely that Howell's wife, Williams, had purchased heroin from Woodford. While that decision obviously had its calculated risks since Howell was subject to impeachment in a variety of ways, it was hardly an illogical or outrageous one which amounted to ineffective assistance of counsel.*

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* Woodford contends that the record is ambiguous whether, prior to trial, his trial attorney in fact had heard the tape recording which was used to impeach Howell. The record shows unambiguously that counsel had listened to several tapes prior to trial and appears to indicate that counsel in fact had heard the tape in question:

> "THE COURT: All right. Do you want to have a rebuttal with all that equipment?
>
> MS. WILLIAMS: Yes, your Honor.
>
> THE COURT: How long will it take?
>
> MS. WILLIAMS: Only long enough to put out the headphones. There is a lengthy tape involved. The tape is lengthy, your Honor. I intend to offer only portions of the tape and play only portions of the [sic]. As your Honor may recall——
>
> THE COURT: Is there a transcript?
>
> MS. WILLIAMS: There is not. I didn't anticipate using it. I didn't know until recently that Mr. Howell would testify. I have one transcript which was made for——
>
> MR. MEDVIN (Defense Counsel): Your Honor, I have heard tapes.

[Footnote continued on following page]

Finally, the claim that counsel was ineffective for failing to object to the proffer of the tape recording in rebuttal, merits swift rejection. In the face of Howell's testimony, the tape recording was plainly proper rebuttal as a prior inconsistent statement on a material issue of fact. Fed. R. of Evid. 613(b).* Cf. *Sullivan* v. *United States*, 411 F.2d 556, 588 (10th Cir. 1969); *United States* v. *Johnson*, 208 F.2d 404, 406 (2d Cir. 1953), *cert. denied*, 347 U.S. 928 (1954); *United States* v. *Hiss*, 185 F.2d 822, 832 (2d Cir. 1950), *cert. denied*, 340 U.S.

THE COURT: Have you heard this tape?

MR. MEDVIN: I don't know.

MS. WILLIAMS: He has had possession of several tapes since July 18th, including this one.

THE COURT: He had an opportunity.

MR. MEDVIN: We have heard tapes.

THE COURT: All right. That's what I wanted to be sure of. How long is it going to take?"

(Tr. 300-301).

In any event, whether or not counsel had heard the particular tape does not advance Woodford's claim since it is clear that the decision to call Howell still was a reasonable one and even the failure to have listened to the tape in question does not amount to ineffective assistance of counsel. *LiPuma* v. *Commissioner*, *supra*; *United States* v. *Ortega-Alvarez*, *supra*. Moreover, Woodford's trial counsel had interviewed Howell and was clearly aware of Howell's own criminal record, including crimes for which he had not been prosecuted. (Tr. 265-266). Therefore, counsel knew that Howell's testimony was susceptible to impeachment. Accordingly, the decision to place Howell on the stand was a tactical one which contained a calculated risk that his testimony might prove damaging. The fact that Howell was impeached by the tape recording rather than by another means does not constitute ineffective assistance of counsel.

* Rule 613(a) of the Federal Rules of Evidence provides that the prior statement of a witness, ". . . whether written or not, . . . need not be shown nor its contents disclosed to him" at the time he is being examined concerning it. Accordingly, the tape recording of Howell's conversation with Agent Daniocek need not have been played while he was being cross-examined, particularly since he was confronted with the substance of the statement on cross.

948 (1951). *See also, United States* v. *Valdes*, 417 F.2d 335 (2d Cir.), *cert. denied*, 399 U.S. 919 (1969); *United States* v. *Newman*, 481 F.2d 222, 224 (2d Cir.), *cert. denied*, 414 U.S. 1007 (1973). Since the identity of Williams' heroin source was clearly the material issue at trial, the Government's impeachment of Howell's testimony by rebuttal was completely proper and any objection would have been without merit.

In sum, Woodford was represented at trial by counsel who, faced with a strong government case, which included defendant's own incriminating post-arrest statements and the corroborated testimony of Williams, forcefully proffered a sensible and realistic defense. That defense was carefully built upon a complete cross-examination of Williams and the presentation of an affirmative defense case. While that defense was rejected by the jury, as plainly was its province, Woodford should not now be heard to assert that his representation at trial was ineffective merely because he is dissatisfied with the ultimate result of the trial.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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United States Attorney for the Southern District of New York, Attorney for the United States of America.

PATRICIA [illegible]NE WILLIAMS,
ROBERT J. JOSSEN,
Assistant United States Attorneys,
Of Counsel.

★ U. S. Government Printing Office 1978— 714-059-802

Form 280 A - Affidavit of Service by mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

Annabelle Chaney being duly sworn, deposes and says that she is employed in the office of the United States Attorney for the Southern District of New York.

That on the 22nd day of May 1978 she served a copy of the within Appeal Briefs by placing the same in a properly postpaid franked envelope addressed:

David Segal
11 Broadway
New York, NY 10014

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Annabelle Chaney

Sworn to before me this

22nd day of May 1978

Olga C. Gramp

OLGA C. GRAMP
Notary Public New York State
No. 43-4620836
Qualified in Richmond Cty.
Com. m. Expires March 30, 1979